
U.S. Department of Labor
Office of Administrative Law Judges
2600 Mt. Ephraim Avenue
Camden, New Jersey 08104

Telephone 609-757-5312

DATE: September 29, 1993

CASE NO. 93-ERA-31

Richard Lassin
Complainant

v.

Michigan State University
Respondent

Jayne M. Flanigan, Esq.
For Complainant

Sally S. Harwood, Esq.
Mary Elizabeth Kurz, Esq.
For Respondent

Before: RALPH A. ROMANO
Administrative Law Judge

RECOMMENDED
DECISION AND ORDER

On April 20, 1993, Complainant filed a complaint (CX 25)[1] pursuant to 29 C.F.R. §24.3, as amended, alleging that Respondent violated the provisions of the Energy Reorganization Act of 1974, 42 U.S.C. Section 5851(a), as amended, (hereinafter the "Act").

By letter dated May 18, 1993, the United States Department of Labor informed Complainant that its investigation of his complaint disclosed sufficient evidence to support the alleged violation (ALJ 1).

By telegram dated May 24, 1993 (ALJ 2, 3), Respondent requested a hearing pursuant to 29 C.F.R. 24.4(d)(2)(i), as

---

[Page 2]

amended.

A hearing was held in Detroit, Michigan on June 28, 30 and July 1, 1993. Post-hearing briefs were filed by the parties on September 2, 1993.

At the hearing, the parties agreed to a waiver of the decisional time requirements provided at 42 U.S.C. 5851(b)(2)(A) and 29 C.F.R. 24.6(a) and (b), as amended. (Tr. 522).

THE LAW

42 U.S.C. 5851(a), as amended H.R. 776 Comprehensive National Energy Policy Act, effective October 24, 1992, reads as follows:

> Employee protection
> (a)(1) Discrimination against employee
> No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)-
> (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 201 et seq.);
> (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
> (C) testified before Congress or at any Federal or State proceeding regarding any provission (or any proposed provision) of this Act or the Atomic Energy Act of 1954;

> [Page 3]
> (D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended (42 U.S.C. §2011 et seq.), or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
> (E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended.
(b)(3) Complaint, filing and notification.....
(C) The Secretary may determine that a violation of subsection (2) has occurred only if the complainant has demonstrated that any behavior described in subparagraphs (A) through (F) of subsection (a)(1) was a contributing factor in the unfavorable personnel action alleged in the complaint.
(D) Relief may not be ordered under paragraph (2) if the employer demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.

Under this statute's predecessor, it has been held that it must be proven by Complainant, *Texas Dept. of Community Affairs v. Burdine* 450 U.S. 248 (1981): (1) that the party charged with discrimination is an employer subject to the Act: (2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions or privileges of employment; and (3) that the alleged discrimination arose because the employee commenced or was about to commence,

---

testified or was about to testify, assisted, participated, or was about to assist or participate in any proceeding, or in any other action to carry out the purposes of 42 U.S.C. §5851 (Energy Reorganization Act) or 42 U.S.C. §2011 (Atomic Energy Act). See, *DeFord v. Secretary of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

Where a complainant shows:
1. engagement in protected activity;
2. the employer's awareness of the employee's engagement in protected activity;
3. the employee's subsequent discharge; and
4. that the discharge followed the protected activity so closely in time as to justify an inference of retaliatory motive,

a *prima facie* case of retaliatory discharge is established, *Couty v. Dole*, 886 F.2d 145, 148 (8th Cir. 1989).

ISSUES

1. Whether Complainant engaged in activity protected under the Act, and whether Respondent was aware of same.

2. Whether Complainant was discharged as a result of such protected activity.

COMPLAINANT'S THEORY OF RECOVERY

Complainant alleges that he was reassigned[2] , suspended and ultimately fired by Respondent because he reported to the Nuclear Regulatory Commission (NRC) radioactive contamination (hereinafter "the spill") detected at the Cyclotron.

That Complainant reported the spill by telephone on March 9, 1993 to the NRC (Tr. 51-55) is nowhere contradicted in this record.

Complainant asserts that Respondent was aware of his report

---

to the NRC based upon his conversations with Dr. Ronningen (Tr. 176, 431) and Dr. Antaya (Tr. 107, 108, 162), and upon Dr. Bieber's testimony (Tro. 250 - 252).

That Complainant's conditions of employment, i.e., the April 3, 1993 reassignment to ORCBS (CX 16,) and/or April 12, 15, 1993 suspension and discharge from employment (CX 19, 22) closely followed in time his March 9, 1993 reporting to the NRC, is evident in this record.

Complainant also advances in support of his assertion of discriminatory discharge; that he had a history of work performance evaluations at very good or better levels (CX 3-7); that he had been promoted continuously since his initial hire in 1983 (Tr. 23, 24); that in June, 1992 he reported to his superiors Respondent's possible possession of radioactive material not included within the scope of the NRC licensed authority therefor (Tr. 40-42); that he disagreed in significant degree with Ms. Kristin Erickson's (Radiation Safety Officer for Respondent) draft spill incident report to the NRC (Tr. 68-70; CX 11, 12); that he and Ms. Erickson disagreed as to the prioritization of the cleanup of radioactive material in one of Respondent's parking lot areas (Tr. 84-87; CX 14); and that he was the only employee reassigned in writing (CX 16).

RESPONDENT'S DEFENSE

First, Respondent argues that because Complainant did not intend his March 9, 1993 telephone call to the NRC to be a "reporting call" (Tr. 53, 150), such event was not a protected activity under the Act.

Second, Respondent urges that, since Dr. Antaya denied that he ever told Complainant that he (Complainant) was identified at a department head meeting as a reporter to the NRC (Tr. 408), there was no awareness on the part of Respondent of any such reporting. Moreover, insists Respondent, as some of Complainant's communications with the NRC occurred after he was suspended by Respondent (Tr. 199-202), such alleged protected activity followed, rather than preceded, the alleged employment action taken by Respondent adverse to Complainant.

Respondent offers that Complainant's reassignment to ORCBS was a legitimate, non-discriminatory exercise of managerial

---

[Page 6]

discretion to marshall and direct its personnel resources toward a response to an NRC on-site inspection[3] of Respondent's safety practices relative to its use of radioactive materials. Further, Respondent argues that its suspension and later termination of Complainant were the appropriate consequences of Complainant's failure to participate and engage in his new (reassigned) job assignment, rather than retaliatory-based actions by Respondent occasioned by Complainant's reporting of the spill to the NRC.

FINDINGS AND CONCLUSIONS
PROTECTED ACTIVITY

I find that Complainant's March 9, 1993 telephone contact with the NRC constitutes a protected activity within the meaning of the Act, despite Complainant's admission that he intended only to obtain "...basic information" and"...not...make a formal allegation at that time" (Tr. 53). For one thing, Complainant did indeed perceive the spill to be a "...reportable incident to the Nuclear Regulatory Commission", and he intended to convey the "...nature of the radioactivity, the extent of the contamination..." [and his] "...concern that the [spill] was not being adequately addressed...(Tr. 52, 53). Moreover, in my view, the public policy underlying the Act, i.e., to facilitate the flow of safety information to the government, *NLRB v. Schrivener*, 405 U.S. 117 (1972), is served irrespective of the reporter's specifically defined intended objective in making the communication. If, as in this case, it is information bearing upon the public safety which is, in fact, conveyed, the communication in which that information is delivered is per se one which warrants protection under the Act. Whether he is discretely desirous of communicating the data or not, the employee who actually transmits such safety related data should be shielded from action of the employer taken in retaliation for such transmission.

RESPONDENT'S AWARENESS

Respondent's position that Dr. Antaya's outright denial that he told Complainant that he (Complainant) had been identified at a department meeting as the reporter to the NRC, evidences Respondent's lack of awareness of the protected activity, is without merit since, in any event[4] , other officials at

---

[Page 7]

Respondent[5] admitted knowledge of the protected activity prior to[6] one or more of the alleged discriminatory actions by Respondent. Further, although some of Complainant's contacts with the NRC occurred after some of the alleged retaliatory actions of

Respondent (e.g. Tr. 199-202), other of such contacts were, without contradiction, made before any of the alleged discriminatory actions were taken (e.g. the initial March 9, 1993 telephone contact - Tr. 52-55). I find that Respondent was aware of Complainant's protected activity.

Accordingly, since the alleged discriminatory action by Respondent occurred in temporal proximity to the protected activity (*supra*), I find that Complainant has established a *prima facie* case for retaliatory action on the part of Respondent.

CASUALTY

I also find, however, that Respondent has overwhelmingly established on this record that its reassignment, suspension and ultimate dismissal of Complainant was occasioned not by the desire to retaliate against him for alerting the NRC to his nuclear safety concerns, but respectively, by its legitimate, non-discriminatory effort to organize its response to the NRC investigation of its handling of radioactivity material, and by Complainant's unjustified failure to join in that effort.

Kristin Erickson, Complainant's immediate supervisor, testified credibly (and consistently with the testimony of other officials at Respondent, see *infra*) of the NRC on-site inspection conducted at Respondent which resulted in several cited apparent potential violations and concerns regarding Respondent's handling and control of radioactive materials (CX 15), and of Respondent's planned reorganization to meet the NRC's demands for improvements. (Tr. 290, *et seq*). Such reorganization was sensibly deemed necessary since Respondent's NRC license had been put in jeopardy by reason of those citations[7] . This reorganizational effort was meant, *inter alia*, to facilitate a thorough survey by Respondent of more than 300 of its laboratories (which utilized radioactive isotopes), and was authorized and directed by Respondent's Radiation Safety Committee, whose chairperson, Dr. Loren Bieber, fully

---

corroborated Ms. Erickson's testimony (Tr. 242, *et seq*). That Complainant's reassignment from Cyclotron to ORCBS was essential to a coordinated deployment of employee resources to this mission, is amply and consistently demonstrated in this record (Erickson, Parmer - (ORCBS Manager); Bieber;). Indeed, evidence that Respondent's management counted upon and needed Complainant's participation in this mission (Tr 235, 468), has not been countervailed. That Complainant was initially reassigned to work specifically on the U. S. Department of Transportation concerns of the NRC, has been clearly shown to be warranted by reason of his expertise in that field (Tr. 319, 449). Management's authority to reassign Complainant (Tr. 449, 472), is nowhere challenged by Complainant in this record.

I find that Respondent has shown that its suspension and dismissal of Complainant was premised upon Complainant's unjustified failure/refusal to take on the work duties

reassigned to him. While, in compliance with Ms. Erickson's directive of April 3 (CX 16), Complainant reported to ORCBS office on April 12, he thereafter left the ORCBS office and, although later located back at the Cyclotron situs, never returned to ORCBS notwithstanding a direct, authorized order to do so (Tr. 180, 330, 331, 454, 455, 477). Complainant's suspension (CX 19) was accordingly justified at this point in time. As to his eventual dismissal, I find that such was justifiably based upon Complainant's failure to attend/report to a meeting with his superiors on April 15, 1993. Complainant was on notice of such meeting (Tr. 118, 230, 514), and failed to justify his failure to appear although invited to do so (CX 22). In my view, this failure to attend the meeting, in effect, simply confirmed Complainant's continuing failure/refusal to assume his reassigned work duties.

I note here that Complainant's suggestion (CX 23, Complt' Br. at 31, 32) that Respondent's dismissal of Complainant was somehow *procedurally* defective, e.g., Respondent's failure to advise Complainant that his non-appearance at the April 15 meeting would result in dismissal, seems only marginally relevant, if at all, to the principal issue to be resolved, that is, whether Respondent dismissed Complainant in retaliation for his protected activity. *How* Respondent dismissed Complainant whether procedurally correctly or otherwise, has, in my view, little or no bearing upon *why* Respondent dismissed Complainant.

[Page 9]

Complainant offers several other factual circumstances, addressed below, from which he asks that I infer discriminatory motive on the part of Respondent:

1. Complainant's outright criticism of Respondent's incident report (via Ms. Erickson) to the NRC (See CX 12, CS 18). The record, however, is replete with credibly consistent evidence to the effect that such criticism was, in large part, either baseless (Tr. 346-349; 426) or, indeed, accepted in part by Respondent by inclusion in an amended incident report filed with the NRC by Respondent (CX 20).

2. Complainant's June, 1992 discovery and warning to Respondent (via Ms. Erickson) that Respondent might be in violation of the NRC licensed/authorized inventory of radioactive material (See CX 9, 10; Tr. 40-46). Such discovery, however, proved to be certainly less than dramatic from Respondent's perspective (Tr. 291-294).

3. Complainant's concern and (apparently ignored) warning to Respondent (via Ms. Erickson) relative to the clearing of radioactive material from the parking lot area (Tr. 82-87; CX 14). But Ms. Erickson, in my judgment, rationally and cogently explained her decision not to prioritize such removal proposal made by Complainant (Tr. 389-393).

4. Respondent's assignment of a conference room to serve as Complainant's office, its written reassignment of only Complainant among those transferred from Cyclotron to ORCBS, and its failure to inform Complainant of the NRC exit interview (Tr. 89, 88, 92;

CX 16). Again, I find Ms. Erickson's explanation of these first two occurrences adequately reasoned and not otherwise countervailed in this record (Tr. 317, 368-372). Moreover, nowhere in this record has Complainant established any attempt by Respondent to exclude him from the NRC exit interview, which Complainant did attend (Tr. 88).

5. Complainant's suspicion, apparently leading to his expedited reporting of the spill to the NRC, that, but for his report to the NRC, Respondent officials might not have at all reported the spill "...outside the University", i.e., to the NRC (Tr. 53). There is no question, however, that, despite a disagreement with Complainant as to the appropriate timing of reporting to the NRC (Tr. 249, 250) there was never any doubt on

---

[Page 10]

Respondent's behalf that a report to the NRC would be made (Tr. 248-254; 306-309).

I find none of the above circumstances, either individually or in combination, sufficient to raise any inference of discriminatory discharge.

Finally, I am compelled to note that I found each and every of Respondent's witnesses (Bieber, Erickson, Antaya, Ronningen, Parmer, Nash) to have testified believably, authoritatively, forthrightly and consistently with each other. The quality of this testimonial evidence was indeed impressive, and facilitated significantly my finding that Respondent has demonstrated legitimate, appropriate, non-discriminatory bases for the employment action it took against Complainant.

I find that Complainant has not demonstrated that his behavior under the Act was a contributing factor in Respondent's unfavorable personnel action (Section (b)(3)(C)). Further, I find that Respondent has demonstrated, under Section (b)(3)(D) of the Act, by clear and convincing evidence, that it would have taken the same unfavorable personnel action in the absence of Complainant's behavior.

RECOMMENDED ORDER

On the basis of the foregoing, I recommend that the complaint be **DISMISSED**.

RALPH A. ROMANO
Administrative Law Judge

Dated: SEP 28 1993
Camden, New Jersey

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for review by the Secretary of Labor to the Office of Administrative Appeals, U.S. Department of Labor, Room S-4309, Frances Perkins

Building, 200 Constitution Ave., NW, Washington, DC 20210. The Office of Administrative Appeals has the responsibility to advise and assist the Secretary in the preparation and issuance of final decisions in employee protection cases adjudicated under the regulations at 29 C.F.R. Parts 24 and 1978. *See* 55 Fed. Reg. 13250 (1990).

[ENDNOTES]

[1]References herein are as follows: "ALJ" - Administrative Law Judge Exhibits, "CX" - Complainant Exhibits, "RX" - Respondent Exhibits, "Tr." - transcript.

[2]From the National Superconducting Cyclotron Laboratory (hereinafter "Cyclotron") to the Office of Radiation, Chemical and Biological Safety (hereinafter "ORCBS").

[3]Conducted from March 10, 1993 to March 23, 1993.

[4]Apart from a credibility determination between Complainant and Dr. Antaya.

[5]Dr. Ronningen (Tr. 431), Dr. Beiber (Tr. 249-252).

[6]Dr. Ronningen, on April 7 or 8, prior to Complainant's suspension or dismissal (Tr. 431); Dr. Bieber, on March 10, prior to Complainant's reassignment, suspension or dismissal (Tr. 249- 252).

[7]Respondent expected an inspection re-visit by the NRC in the Fall, 1993. (Tr. 259).